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No. 113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CLEAVER-BROOKS MFG. CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 998

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NATIONAL LABOR RELATIONS BOARD,

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vs.

CLEAVER-BROOKS MFG. CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

Whether an employer, who is presented with substantial proof that the overwhelming majority of his employees favors one union over another, is justified in engaging in collective bargaining with the favored union.

STATUTES INVOLVED

Section 1 of the Labor Management Relations Act of 1947 provides: (29 U. S. C. A. Sec. 151.)

"The denial by some employers of the right of employees to organize and the refusal by some employers

to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest * * *."

Section 7 of the same Act provides: (29 U. S. C. A. Sec. 157.)

"Employees shall have the right to self-organization, to form * * * labor organizations, to bargain collectively through representatives of their own choosing * * *."

Section 8 (a) (5) provides: (29 U. S. C. A. Sec. 158.)

"It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees * * *."

STATEMENT OF THE CASE

Briefly stated.

This case involves a company which is presented with demands for recognition by two unions, one of which presents no representation proof and the other of which demonstrates that it has the support of 35 out of a total of 47 employees.

Both unions have petitioned the Board for an election and for certification, and the Company has joined in their request for an election, but the Board will not conduct an election because unfair labor practice charges are pending.

Under these circumstances is the Company justified in recognizing the union which represents the overwhelming majority of its employees?

Vote by Employees.

The circumstances under which the employees demonstrated their choice were glossed over in the Board's Petition, and deserve further treatment.

It was not until the employees had posted a notice, announcing the time and place of their meeting to discuss the formation of a union, that the Steelworkers Union manifested any organizing interest.

The employees went ahead with their own meeting, as planned. It was away from the plant premises and after working hours. No supervisors or foremen were present. Organizers for both the Steelworkers Union and the Machinist Union were allowed to be present and to participate in the meeting.

After a full discussion of the merits and shortcomings of an Independent Union, versus a union affiliated with the United Steelworkers of America, or a union affiliated with the International Association of Machinists, 35 out of a possible 47 employees, which was just about all of the employees who attended the meeting, chose to sign as charter members of the Independent Union. In doing so, they rejected both the Steelworkers Union and the Machinists Union, whose high handed tactics at the meeting were resented by the employees. (R.A. 37-39).

The Company was advised by its employees of what happened at this meeting and was shown the charter of the Independent Union bearing the signatures of three-fourths of its employees. (Resp. Exh. 1, R. A. 63) When pressed by the Independent Union for recognition, the Company considered that it had no good reason for withholding recognition under these circumstances.

Reasons for Denying the Writ.

1. There is no conflict among the decisions of the courts of appeal on the question involved in this case. In the Hoover, Ohio Ferro and Electronics Equipment cases (cited

by the Board at P. 7 of its Petition), the employer refused to recognize either of the two rival unions until election and certification by the Board. Each of those cases was concerned with whether coercive activity on the part of one of the rival unions, while the representation proceeding was pending, was or was not protected concerted activity under Section 7 of the Act.

2. Quite a different situation exists, however, where one union demonstrates that it has a clear majority, and the employer is willing to recognize that union. Under these circumstances, the cases uniformly hold that the employer not only has the right, but the duty as well, to bargain collectively with the union of his employee's choice.

In *N.L.R.B. v. Corning Glass Works*, 204 F^2 422 (C.A. 1), the employer recognized a union with 65% support, without an election, in spite of the existence of a rival union.

In *N.L.R.B. v. Standard Steel Spring Co.*, 180 F^2 942 (C.A. 6) the employer recognized a union with two-thirds support as against a rival union, despite a pending election proceeding.

In *District 50, United Mine Workers v. N.L.R.B.*, 234 F^2 565 (C.A. 4) the employer recognized a union which showed a clear majority, although a rival union was demanding recognition, and without an election.

In *N.L.R.B. v. Flotill Products*, 180 F^2 441 (C.A. 9) the employer recognized a union with 70% support, although a representation proceeding was pending on the petition of a rival union.

In *N.L.R.B. v. Indianapolis Newspapers, Inc.*, 210 F^2 501 (C.A. 7) the employer recognized a union with 60% sup-

port, as against a rival union which had been certified by the Board two years before.

In all of these cases the charges filed by the Board against the employer were dismissed by the courts. In every case we have been able to find, where the employer recognized a union which showed clear majority standing, and without the formality of a Board election, the position of the employer has been sustained.

Thus, instead of conflicting, the decision of the Seventh Circuit Court of Appeals in the instant case is in strict accord with all prior judicial decisions.

3. *Strict Neutrality.* The contention by the Board that the Act imposes a requirement of "strict neutrality" on the part of the employer, is not correct, and has been the subject of frequent exceptions, recognized by the Board itself.

In fact, the Board has taken the position that an employer's insistence upon a Board election prior to bargaining, in the face of definite proof of representation status on the part of the union, is itself an unfair labor practice. See *W. T. Grant Co.*, 94 N.L.R.B. 1133 (enforced 199 F^2 711, C.A. 9; Cert. Den. 344 U.S. 928).

In the following cases the Board departed from the so-called "strict neutrality" rule and approved the employer's recognition of the union demonstrating its majority status, in spite of claims by a rival union and in advance of a Board election:

Ensher, Alexander & Barsoom, Inc., 74 N.L.R.B. 143

Wm. Penn Broadcasting Co., 93 N.L.R.B. 1404

Gulf Shipside Storage Corp., 91 N.L.R.B. 1181

4. We think the correct legal principles are well expressed by Judge Parker in *District 50* (234 F^2 565) at p. 569, as follows:

> "It is clear, also that, under the circumstances above set forth, the Board would be justified in holding it an unfair labor practice to recognize District 50 as the bargaining representative of the employees of the Reedsville companies, if there were any real question as to District 50 representing a majority of such employees. *It would not be an unfair labor practice, however, to recognize District 50 as the bargaining representative of these employees if there was no real question as to its representing a clear majority*, whether judged with respect to the three plant or the five plant unit. An employer should not aid one of two competing unions by giving the weight of his recognition to one of them while a real question of representation is pending before the Board. Midwest Piping & Supply Co., 63 N.L.R.B. 1060. And we think the same principle applies even though a petition for representation has been dismissed without prejudice as premature, as in this case, if any real question remains as to which union represents a majority. See N.L.R.B. v. Indianapolis Newspapers, Inc., 7 Cir., 210 F. 2d 501. *If however, there is no such question, there is no basis for holding an employer guilty of an unfair labor practice in recognizing as bargaining agent a union which represents a clear majority of his employees.*" (Emphasis supplied)

The important factor is not whether there are rival demands, or pending petitions with the Board, but rather whether or not there is any real question of representation. Where the evidence shows (as it does here) that the union recognized by the employer has a clear majority, then the employer has acted properly.

In the instant case, the Court of Appeals noted the

Steelworkers "to be no genuine contender," saying: (Petition, p. 25)

> "Signatures of thirty-five out of a possible forty-seven employees indicates such a clear showing of majority representation."

5. Any different rule would place a premium on the mere filing of a petition by a rival union which has little or no standing with the employees. Collective bargaining would be brought to a standstill and the real goal of the Act, i.e., attaining industrial harmony, would be frustrated.

That is not to say that the employer is free to select which of two rival unions he will recognize, and thereby defeat the organizing efforts of the other union. Any selection on the employer's part is subject to careful scrutiny, and it is up to him to demonstrate that the union he recognizes does in fact represent his employees.

Where, as here, the facts are clear that it was the employees who made the selection between rival unions, and the employer merely recognized the results of their choice, then the action of the employer fulfills the objectives of the Act and promotes the cause of collective bargaining.

6. In most instances, where there are two genuinely contending unions, the employer will prefer to withhold recognition until the Board has conducted an election and determined the winner. It is only in rare cases, like the present one, where the parties cannot resolve the contest by an election, that the employer is confronted with the necessity of making a choice without an election. Fortunately, in the instant case the employees themselves made a determination by holding a "town meeting," taking a secret vote by ballot, and then recording their choice by signing the charter of the Independent Union. No one claims that the meeting was not fairly conducted, or that

the defeated unions were not given every opportunity to present their views. Short of a Board-conducted election (which was not available) there is hardly a better means by which the employees could have recorded their choice between rival unions.

7. A period of two and one-half years has now elapsed since the employees made their choice, and three contracts have been successfully bargained by the parties in the meantime. If the views expressed by the Board in its Petition were to prevail, collective bargaining would have been at a standstill throughout that period of time. One can imagine the frustration of the employees if for a period of 2½ years they had been told by the Company that they must await an election by the Board before any bargaining can commence.

8. The Board contends that "the Steelworkers presumably made such a showing" (at least 30 percent of the employees), because the Regional Director scheduled a hearing on the petition of the Steelworkers and then later cancelled it.

Actually, there was no evidence introduced at the trial of how many employees had signed up with the Steelworkers Union. It was impossible for the Board's Regional Director to know what percentage the Steelworkers had, since the Regional Director did not know the names of any employees nor did he know how many there were.

Furthermore, the evidence is that at the meeting of January 21, 1957, where the organizers for the Steelworkers and Machinists Unions tried desperately to stampede the meeting, several of the employees, who had previously favored the Steelworkers Union, became so disgusted with the organizers' tactics that they signed up with the Independent Union.

Counsel for the Board urge that an employer must not be permitted "to watch the ebb and flow of sentiment" and then jump in with recognition when the favored union is ahead. In this case, however, the employer was confronted with a tidal wave, involving employees who hotly resented the hoodlum tactics of the professional organizers and had overwhelmingly indicated their preference for the Independent Union.

After this meeting, the Steelworkers Union was no longer a bona fide contender, if it had ever been one, which is extremely doubtful.

As stated by the Court of Appeals: (Petition, p. 25)

> "The Board suggests that the Company has, in effect, observed the ebb and flow of fluctuating sentiment and made timely recognition of the favored union. The facts contradict such finding here. The Company postponed negotiation until pressed by the Independent whose membership, as represented by signatures to the charter, showed Steelworkers to be no genuine contender."

CONCLUSION

We submit that the decision of the Court of Appeals, which is not in conflict with the decision of any other Court of Appeals, is correct and serves the true purposes of the Act. Where one of two rival unions clearly demonstrates a majority, the employer is justified in according recognition to it.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: July 15, 1959.